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14 KEATING DENTAL ARTS, INC.

14

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DISTRICT

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on February 26, 2013, at 8:30 a.m., or as
3 soon thereafter as the matter may be heard by the Honorable David O. Carter of the
4 United States District Court for the Central District of California, Southern
5 Division, at 411 West Fourth Street, Courtroom 9D, Santa Ana, CA, 92701,
6 Defendant and Counter-Plaintiff Keating Dental Arts, Inc. ("Keating" or
7 "Defendant") will move and hereby does move for an order excluding from trial
8 any testimony from Nicole Fallon ("Fallon"). Plaintiff and Counter-Defendant
9 James R. Glidewell Dental Ceramics, Inc. ("Glidewell") did not timely disclose
10 Fallon as a potential witness and did not timely supplement its discovery responses
11 regarding Fallon's interaction with Dr. Jade Le's Dental Offices. Accordingly,
12 Fallon's trial testimony should be excluded due to Glidewell's failure to list Fallon
13 in Glidewell's Rule 26 initial disclosures. In addition, any evidence or argument
14 introduced for the first time in Fallon's untimely declaration should be excluded
15 pursuant to Federal Rule of Civil Procedure ("F.R.C.P.") 37(c)(1).

16 This motion is based upon this Notice, the accompanying Memorandum of
17 Points and Authorities, all pleadings, papers, and records on file in this action, all
18 matters of which the Court may take judicial notice, and such further written and
19 oral argument as may be presented to the Court.

20 Respectfully submitted,

21 KNOBBE, MARTENS, OLSON & BEAR, LLP

22 Dated: January 17, 2013

23 By: /s/ David G. Jankowski

24 Darrell L. Olson

25 Lynda J. Zadra-Symes

26 Jeffrey L. Van Hoosear

27 David G. Jankowski

28 ENTERPRISE COUNSEL GROUP ALC

29 David A. Robinson

30 James S. Azadian

31 Attorneys for Defendant and Counter-Plaintiff
32 KEATING DENTAL ARTS, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant and Counter-Plaintiff Keating Dental Arts, Inc. (“Keating” or “Defendant”) hereby moves for an order *in limine* to exclude from trial any testimony from Plaintiff and Counter-Defendant James R. Glidewell Dental Ceramics, Inc.’s (“Glidewell”) employee Nicole Fallon (“Fallon”). Glidewell did not timely disclose Fallon as a potential witness and did not timely supplement its discovery responses regarding Fallon’s interaction with Dr. Jade Le’s Dental Offices. Accordingly, the testimony of Nicole Fallon and any evidence or argument introduced for the first time in Fallon’s untimely declaration should be excluded pursuant to F.R.C.P 37(c)(1).

II. RELEVANT BACKGROUND

A. Fallon Is Not Listed As A Witness In Glidewell's Initial Disclosures

As stated in the Court’s Scheduling Order (Docket No. 15), the discovery cut-off was October 29, 2012. Glidewell served its Initial Disclosures Under F.R.C.P. 26(a)(1)(A) on December 5, 2011. In its Initial Disclosures, Glidewell identified only two individuals as having knowledge relating to the likelihood of public confusion, both of whom are Glidewell employees: Robin Bartolo (Sales Manager for Glidewell Direct) and Wolfgang Friebauer (Glidewell’s Director of R&D). (Docket No. 125-2.) When deposed, however, neither witness had personal knowledge of actual confusion between the parties’ marks or products. (Docket No. 91-5 at 76:19–78:13; Docket No. 92-1, Ex. 52 at 72:15–74:5.)

B. Glidewell Provides Initial Account of Fallon's Interaction With Dr. Jade Le's Dental Offices During Discovery

During discovery, Keating served Glidewell with two interrogatories (Nos. 7 and 12) seeking information regarding incidents of actual confusion

1 between the parties' marks and products. (Docket No. 91-1.) The entirety of
2 Glidewell's August 20, 2012 response as it related to Fallon is the following:

3 On one occasion this April a Glidewell Laboratories employee (Nicole
4 Fallon) was offering a \$20.00 coupon to try BRUXZIR® restoration to
5 Michelle Carlisle of Dr. Jade Le's dental Offices in Bonita Springs,
6 Florida. Michelle asked if they could apply the \$20.00 coupon to
7 purchases they had previously made and sent a copy of an invoice to
show the alleged earlier purchase. It was a Keating Dental Arts Inc.'s
invoice for a KDZ Bruxer crown dated February 9, 2012.

8 (*Id.* at 7–10 (response Nos. 7 & 12).) Keating served a follow-up interrogatory
9 asking for “all factual information” relating to the incident with Fallon, including
10 how and why contact was initiated and any resolution that resulted. Glidewell's
11 October 10, 2012 response was the following:

12 An employee of Plaintiff randomly called Dr. Le's office to offer a
13 discount on BRUXZIR Crowns and was asked whether the discount
14 could apply to a previous order that had actually been submitted to
Defendant for a KDZ Bruxer Crown.

15 (Docket No. 91-2 at 7 (response to No. 23).)

16 Keating also served a follow-up request for production that requested “[a]ll
17 documents and things referring or relating to Dr. Jade Le's Dental Offices in Bonita
18 Springs, Florida regarding an order or purchase of a BURXZIR [sic] or a KDZ
19 BRUXER.” Glidewell's October 10, 2012 response was a single word, “None.”
20 (Docket No. 125-4.)

21 Based on the above exchange, Glidewell admitted during discovery that
22 Fallon initiated the communication with Dr. Le's office through a random contact
23 to offer a discount coupon. Glidewell also admitted that Fallon offered a discount
24 coupon to Michelle Carlisle over the telephone, not to Dr. Jade Le. Glidewell
25 further admitted (through silence in its interrogatory responses) that Fallon did not
26 communicate directly with Dr. Jade Le regarding this incident. Glidewell further
27 admitted that it had no documents relating to the communications between Fallon
28 and Dr. Le's dental office.

1 Even if the Court were to allow Glidewell to rely on Fallon's hearsay
 2 statements¹ attributable to Ms. Carlisle, the only "confusion" that is apparent from
 3 Glidewell's original account is that Dr. Le's employee, Ms. Carlisle, was confused
 4 as to which product the coupon applied; not as to the difference between Glidewell
 5 and Keating's products.

6 **C. Fallon Changes Her Account Of Her Interaction With Dr. Jade**
 7 **Le's Dental Offices After The Close Of Discovery**

8 After the October 29, 2012 discovery cut-off date, Ms. Fallon's account of
 9 the discussion with Dr. Le's dental lab changed in the following material ways:

- 10 • Ms. Carlisle now became the person who initiated the contact. (Docket
 No. 90-1, Ex. M at ¶ 4 ("Ms. Michelle Carlisle . . . called me to request a
 Glidewell discount. . . ."));
- 11 • Now she begins speaking directly with Dr. Jade Le in addition to speaking
 with Ms. Carlisle. (*Id.* at ¶ 5 ("Dr. Le joined the phone conversation . . .
 ."));
- 12 • Now she states Dr. Le makes an express statement of confusion between
 the parties' marks. (*Id.* ¶ 5 ("Dr. Le . . . said that she thought 'BruxZir'
 and 'Bruxer,' from Keating, 'were the same thing.'")));
- 13 • Now Fallon has a fax containing a copy of the Keating invoice from Dr.
 Le. (*Id.* ¶ 4; Docket No. 90-2, Ex. 1.); and
- 14 • Now Fallon memorialized her conversation with Ms. Carlisle and Dr. Le
 in a "note report" that "accurately reflects" her conversation and "was
 maintained in the ordinary course of Glidewell's business." (*Id.* ¶¶ 9-10;
 Docket No. 90-2, Ex. 2.).

15 Despite purportedly being part of Glidewell's business records in existence
 16 since April 2012, Glidewell did not produce Exhibits 1 and 2 referenced in Fallon's
 17 declaration (Docket No. 90-2, Ex. M) until November 16, 2012, several weeks after

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 19 ¹ Fallon's testimony regarding the out-of-court statements allegedly made by Ms.
 Carlisle is inadmissible hearsay pursuant to Fed. R.Evid. 801 and 802.

1 the close of discovery. Keating has had no opportunity to examine Fallon or other
 2 witnesses about these documents.

3 **III. FALLON'S UNTIMELY DECLARATION AND TESTIMONY**
 4 **SHOULD BE EXCLUDED PURSUANT TO F.R.C.P. 37(C)(1)**

5 Under F.R.C.P. 26(a)(1) (A), a party must disclose to the other parties the
 6 identity of each individual likely to have discoverable information, along with the
 7 subjects of that information. A party must make the initial disclosures at or within
 8 14 days after the parties' Rule 26(f) conference. F.R.C.P. 26(a)(1)(C). Moreover, a
 9 party "is not excused from making its initial disclosures because it has not fully
 10 investigated the case." F.R.C.P. 26(a)(1)(E).

11 Under F.R.C.P. 26(e), a party "who has responded to an interrogatory,
 12 request for production, or request for admission ... must supplement or correct its
 13 disclosure or response ... in a timely manner if the party learns that in some
 14 material respect the disclosure or response is incomplete or incorrect."
 15 F.R.C.P. 26(e)(1)(A). "If a party fails to provide information or identify a witness
 16 as required by Rule 26(a) or (e), the party is not allowed to use that information or
 17 witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure
 18 was substantially justified or is harmless." F.R.C.P. 37(c)(1).

19 Here, Glidewell violated F.R.C.P. 26(a)(1) (A) by failing to disclose Fallon
 20 in its Initial Disclosures as an individual likely to have discoverable information
 21 that Glidewell may use to support its claims and/or defenses. Fallon was first
 22 identified as an individual possessing discoverable information in Glidewell's
 23 interrogatory responses served August 20, 2012, nine months after Glidewell's
 24 Initial Disclosures. (Docket No. 91-1.)

25 Additionally, Glidewell violated F.R.C.P. 26(e)(1) by failing to timely
 26 supplement its initial responses to Keating's interrogatories and document requests
 27 regarding the testimony of Fallon. Glidewell cannot inform Keating during
 28 discovery that it has no documents corroborating Fallon's incident, and then rely on

1 documents produced after the discovery cut-off for that express purpose. Nor can
2 Glidewell set forth one account of Fallon's incident during discovery and then rely
3 upon a version of the incident proffered after the discovery cut-off that contradicts
4 its earlier account.

5 Due to Glidewell's untimely disclosure and failure to supplement, Keating
6 never had the opportunity to examine Nicole Fallon regarding her untimely served
7 declaration. Accordingly, pursuant to F.R.C.P. 37(c)(1), the untimely testimony of
8 Ms. Fallon must be excluded from trial unless Glidewell can show a "substantial
9 justification" for its violation of F.R.C.P. 26(e)(1), or show that its violation was
10 harmless. *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th
11 Cir. 2001).

12 Glidewell has not offered sufficient justification for its failure to timely
13 supplement its discovery responses. The only explanation given by Glidewell in its
14 *Ex Parte* Application (which the court denied) for its numerous untimely filings
15 was that Glidewell's prior counsel had not been diligent. (Docket No. 69 at 1.)
16 Lack of diligence, however, is not an excuse for ignoring the court's scheduling
17 orders. *Wong v. Regent of University of California*, 410 F.3d 1052, 1062 (9th Cir.
18 2005).

19 Furthermore, the prejudice to Keating has increased significantly because
20 Keating did not have the opportunity to examine Fallon regarding her untimely
21 declaration. In light of this increased prejudice, the burden on Glidewell of
22 showing a "substantial justification" is concomitantly increased.

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IV. CONCLUSION

For the foregoing reasons, Fallon's trial testimony, and any argument relating thereto, should be excluded due to Glidewell's failure to list Fallon in Glidewell's initial disclosures and, moreover, any evidence introduced for the first time in Fallon's untimely declaration, and any argument relating thereto, should be excluded.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: January 17, 2013

By: /s/ David G. Jankowski

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